BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILLY J. YATES	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,032,723
	)	
SEDGWICK COUNTY	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the April 3, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Roger A. Riedmiller, of Wichita, Kansas, appears for claimant. Robert G. Martin, of Wichita, Kansas, appears for self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant was injured by accident arising out of and in the course of his employment with respondent when he aggravated preexisting knee problems. Respondent was ordered to furnish the names of three physicians for selection of one by claimant for treatment. All medical was ordered paid, including unauthorized medical.

The record is the same as that considered by the ALJ and consists of the transcript of the April 3, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as when the appeal is from a final order.[2]

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[1] K.S.A. 44-534a.

[2] K.S.A. 2006 Supp. 44-555c(k).

ISSUES

Respondent requests review of the ALJ's finding that claimant met with personal injury by accident arising out of and in the course of his employment with respondent. Respondent argues that claimant's injury did not occur in the course of his employment, but that claimant suffered from extensive degeneration in his knees in 2004 and that claimant was a candidate for a total knee replacement in both knees before alleging a work-related injury in 2006. Respondent further contends claimant's required walking at work was not of a sufficient caliber to constitute anything more than a personal risk, and claimant's injury is the result of an activity of day-to-day living.

Claimant contends that his knees are worn out as a result of the cumulative effects of standing, walking, and working on concrete or steel surfaces on a daily basis. Accordingly, claimant requests that the Board affirm the preliminary hearing Order of the ALJ.

The issue for the Board's review is: Did claimant suffer an injury caused by an accident arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant is a detention deputy at the Sedgwick County Detention Facility. He has worked in that capacity for 20 years. Claimant first began experiencing problems with his knees in 2004 and said his knees have been getting worse since then. But he has only alleged repetitive use traumas to his right and left knees beginning "June 2006 and each working day thereafter."[3]

Claimant described the different areas he worked in as a detention deputy. He worked in the pods, as a rover, in booking, in processing, and in family and professional visitation. Claimant described working in the pods and sitting and monitoring the inmates. He said he would get up and walk around checking on the inmates occasionally. On days he was working in the pods, he spent about 50 percent of the day on his feet. When he was standing and walking in the pods, he would be standing and walking on steel with tile over it. Walking on that type of surface caused difficulties with his knees. Claimant also would go up and down two flights of stairs once an hour when making his rounds. Claimant worked in the pods 50 percent of the time in the last year.

Claimant also worked as a rover 20 to 30 percent of the time. As a rover, he would be assigned the care of several pods. He would move from pod to pod bringing supplies and giving coworkers breaks. If an inmate would get out of hand, he might wrestle the inmate to the floor. He would be on his feet 80 percent of the time he worked as a rover and would be standing on concrete.

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[3] Form K-WC E-1 Application for Hearing filed Jan. 12, 2007.

The booking and processing positions appear to be similar, but claimant described them as being two separate positions. When asked to describe his duties in the booking position, claimant said "processing"[4] but gave no information on what tasks that involved. When working in this position, claimant would spend 90 to 100 percent of the time on his feet. Claimant did not work in this position very often, saying it was less than 5 percent of his time. However, on the days he worked in the booking position, by the end of the day he found it hard to walk to his car.

In the processing position, claimant would check in inmates, fingerprint them, and tally their property. He would hardly ever sit down while working in processing and said 90 to 95 percent of the time he was on his feet. Again, he rarely worked this position and said he working in processing about 5 percent of his time.

Claimant described the family and professional visitation position as being a sedentary position where he would sit behind a desk with a computer and check in inmates who were visiting family, friends, attorneys, and parole officers. He spent about 40 to 45 percent of his time working in this position and said that 80 percent of that time was spent sitting.

Claimant admitted that he did not need to use stairs at the jail because elevators are usually used. He never bought sole inserts for his shoes to cushion his feet.

Claimant complained to respondent about his knees in June 2006. In December 2006, he was sent to occupational therapy, and x-rays were taken of his knees. The doctors at the occupational health clinic did not provide claimant with or authorize any additional medical treatment for his knees.

Clearly, claimant suffered from bilateral knee problems before June 2006. Claimant admitted that his knees hurt him a little before 2004 but he "blanked it out."[5] His family physician, Dr. Mark VinZant, told him in April 2001 that he had arthritis in his right knee. Dr. VinZant also noted that claimant had problems with pain in this right leg in April 2002. In May 2003, claimant had left knee pain which Dr. VinZant diagnosed as degenerative in nature. In September 2004, Dr. VinZant referred claimant to Dr. Bernard Poole for degenerative arthritis in both knees. Dr. Poole recommended bilateral total knee replacement. Dr. Poole's records did not mention causation of claimant's knee problems.

Claimant was seen on February 27, 2007, by Dr. George Fluter at the request of claimant's attorney. Dr. Fluter diagnosed claimant with degenerative joint disease affecting both knees and stated "there is a causal/contributory relationship between [claimant's]

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[4] P.H. Trans. (Apr. 3, 2007) at 11.

[5] *Id*. at 20.

current condition and work-related activities. Work activities including walking and stair climbing as part of job duties would contribute to the condition."[6]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

Because the accident occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[9]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[10]

In *Hensley*[11], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to Larson's *The Law of Workmen's Compensation*, Sec. 7.04, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. Although in this case claimant did not have an unexplained fall, his accident could be described as falling into the same category of a neutral risk.

K.S.A. 2006 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily,

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[6] *Id.*, Cl. Ex. 1 at 4.

[7] K.S.A. 2006 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[9] See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[10] *Supra* note 7 at Syl. ¶ 4.

[11] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

> accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2006 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann,*[12] denied workers compensation benefits, holding that

> physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."[13] The evidence was

> that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were [not] caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .
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> . . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[14]

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[12] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

[13] *Id.* at 736.

[14] *Id.* at 738-39.

Similarly, in *Martin,*[15] the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

More recently, the Kansas Court of Appeals in *Johnson*[16] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[17]

ANALYSIS

The foregoing statute which defines "injury," excludes disabilities from being found to have been caused by the employment where they are shown to be the result of the natural aging process or the "normal activities of day-to-day living." The burden to show a disability is the result of the natural aging process or the normal activities of day-to-day living is upon the respondent.

Although walking can be described as a normal activity of day-to-day living, K.S.A. 44-2006 Supp. 508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Boeckmann* and *Martin.*

Claimant's job requires a significant amount of standing and walking on hard surfaces. The court in *Boeckmann* distinguished from its holding those cases where "the

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[15] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

[16] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

[17] *Id.* at 788.

injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[18] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[19] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

The only expert medical opinion on the causation issue is contained in Dr. Fluter's report. Dr. Fluter states that claimant's work activities contribute to his bilateral degenerative arthritis condition in his knees. Dr. Fluter recommends claimant restrict his standing, walking, and stair climbing to an occasional basis. Claimant's work has aggravated and accelerated his preexisting condition.

CONCLUSION

Here, claimant's accident arose out of and in the course of his employment with respondent. His injury and resulting temporary total disability are directly attributable to his work. Claimant was not injured because of a personal risk and is not disabled due to a personal condition as in *Boeckmann*, *Martin*, or *Johnson*. Accordingly, his disability did not result from the normal activities of day-to-day living.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated April 3, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Robert G. Martin, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge

[18] *Supra* note 11 at 737.

[19] *Supra* note 15 at 789.